Issue: Qualification/retaliation, misapplication or unfair application of the Standards of Conduct and agency's security policy; Ruling Date: November 19, 2004; Ruling #2004-898; Agency: Department of Criminal Justice Services; Outcome: all issues qualified for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Criminal Justice Services
Ruling No. 2004-898
November 19, 2004

The grievant has requested a ruling on whether the issues not qualified by the Department of Criminal Justices Services (CJS or the agency) in his August 11, 2004 grievance may proceed to hearing. For the reasons set forth below, all of the issues raised in this grievance are qualified for hearing.

FACTS

On July 14, 2004, the grievant received a Group I Written Notice for allegedly loaning his access card to another employee in violation of the agency's security policy. The grievant initiated a grievance challenging the Written Notice claiming that it was unwarranted and too severe for the offense. In addition, he claimed that the agency did not follow its normal disciplinary practices or the state's suggested practice of progressive discipline. The grievant further claimed that the disciplinary action was retaliation for his "participation in race discrimination litigation by a former employee of [his] section."

The agency head qualified the formal disciplinary action (Group I Written Notice) but declined to qualify the issues of misapplication or unfair application of the Standards of Conduct and the agency's security policy. Likewise, the agency head declined to qualify the issue of retaliation.

DISCUSSION

By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices and those suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline) automatically qualify for a hearing.[1] As such, the agency appropriately qualified the Written Notice for hearing. The agency head did not qualify the issues of misapplication or unfair application of SOC or the agency's

[1] Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* 4.1(a)-(c).

security policy, however, because he essentially determined that the agency had complied with these policies when it disciplined the grievant.

It is not for this Department to address the merits of a grievance challenging formal disciplinary action by an agency. Such determinations are precisely the sort that a hearing officer makes at the grievance hearing. With all formal disciplinary actions it is the:

> responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) whether the agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense) and, finally, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances.[2]

Thus, in grievances challenging formal discipline, related issues regarding the agency's compliance with applicable policies are properly directed to and considered by the hearing officer at the grievance hearing. Likewise, the related issue of mitigation, referenced by the grievant in his Grievance Form A, is also one properly considered by the hearing officer in determining whether the challenged discipline was warranted.[3] Accordingly, the misapplication/unfair application of policy and mitigation issues are qualified for hearing.

The issue of retaliation was also denied by the agency head. In this case, however, retaliation is not an independent claim, but rather a theory as to why the agency's disciplinary action against the grievant was unwarranted. This Department has long held that alternative theories for adverse employment actions that have already been qualified for hearing should be qualified as well.[4] In a case such as this where a formal disciplinary action has been qualified, it simply make sense to send any additional theories for the action (such as retaliation) to hearing to ensure a full exploration of what

---

[2] *Rules for Conducting a Grievance Hearing,* VI (B).
[3] Note, however, that if "the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness." *Rules for Conducting a Grievance Hearing,* VI (B).
[4] *See* EDR Rulings 2003-474, 2004-569; 2004-659.

could be interrelated facts and claims. Accordingly, the issue of retaliation is also qualified for hearing.

CONCLUSION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. Additionally, please note that this qualification ruling is not a determination regarding the merits of the grievant's claims.

_____
Claudia T. Farr
Director

_____
William G. Anderson, Jr.
EDR Consultant, Sr.

Enclosure